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C 07-3668 RMW (PR)

Petitioner,

V.

JAMES A. YATES, Warden,

Respondent.

21 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER**

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MICHAEL DAVID GUTIERREZ,

Petitioner,

V.

JAMES A. YATES, Warden,

Respondent.

C 07-3668 RMW (PR)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF ANSWER**

INTRODUCTION

22 California state prisoner Michael David Gutierrez has filed a petition for writ of habeas
23 corpus in this Court raising the following federal constitutional claims: one, petitioner's federal
24 constitutional right to due process was violated when the trial court improperly allowed the
25 testimony that Mr. Lionetti had identified petitioner in person, in a one-person show up at the
26 hospital, which was erroneously admitted over objection in violation of his right to confrontation;
27 two, petitioner's federal constitutional right to due process was violated when the trial court erred
28 in excluding evidence which provided an alternative reason for petitioner to avoid contact with the

1 police on January 7, 2004; and three, the cumulative errors were prejudicial.

2 **STATEMENT OF THE CASE**

3 On June 16, 2004, the District Attorney filed an information in Santa Clara County
 4 Superior Court accusing petitioner, Michael David Gutierrez, as follows: count one, carjacking
 5 where the victim is the driver in violation of California Penal Code § 215^{1/} with enhancements for
 6 personal use of a deadly weapon within the meaning of § 12022(b)(1), and personally inflicting great
 7 bodily injury within the meaning of §§ 12022.7 and 1203(e)(3); count two, assault with a deadly
 8 weapon in violation of § 245(a)(1), with enhancements for personal use of a deadly weapon within
 9 the meaning of §§ 667 and 1192.7 and personally inflicting great bodily injury within the meaning
 10 of §§ 12022.7(a) and 1203(e)(3). It was further alleged that petitioner had been previously
 11 convicted of two felonies for which he had served separate prison terms within the meaning of §
 12 667.5(b), including one of which was a violent or serious felony within the meaning of §§ 667.5(c)
 13 and 1192.7(c), and a serious felony within the meaning of §§ 667.5(a) and 1192.7. 1 CT 9-13.

14 On November 23, 2004, a jury returned verdicts of guilty and found the allegations of
 15 weapon use and infliction of great bodily injury to be true. 1 CT 147-51. Both parties waived their
 16 rights to a jury trial of the prior-conviction allegations. 1 CT 151.

17 On December 6, 2004, the District Attorney's motion to dismiss the prior-conviction
 18 allegations under § 667.5 was granted, and the court found the remaining prior-conviction
 19 allegations to be true. 1 CT 154.

20 On February 17, 2005, the court sentenced petitioner to state prison for a term of twenty-
 21 six years, consisting of eighteen years for double the upper term for count one, plus three years for
 22 the great-bodily-injury enhancement, plus five years for the prior-conviction enhancement. A
 23 sentence of six years for double the midterm for count two was imposed concurrently. 1 CT 233-35.

24 On November 20, 2006, the California Court of Appeal, Sixth Appellate District, affirmed
 25 the judgment. Exh. F.

26 On February 7, 2007, the California Supreme Court denied petitioner's petition for review.

28 1. Unspecified statutory references are to the California Penal Code.

1 Exh. H.

2 On July 17, 2007, petitioner filed a petition for writ of habeas corpus in this Court.

3 On February 12, 2008, this Court issued an order to show cause.

4 **STATEMENT OF FACTS²**

5 **Prosecution Evidence**

6 On January 7, 2004, in the early morning hours, Anthony Lionetti was flagged down at
 7 a gas station as he drove his taxicab down Fruitdale from the 7-Eleven near the corner of Bascom
 8 and Fruitdale in San Jose. The man got into the taxicab and said that he wanted to go King and
 9 McLaughlin. 1 RT 64. The man was Hispanic, appeared to be in his late twenties, and was wearing
 10 a checked shirt over a T-shirt with jeans. He had not shaved in a couple of days. 1 RT 66-67.
 11 Lionetti drove the taxicab to McLaughlin, but the fare said to drive to Virginia. Lionetti was
 12 suspicious because Virginia is a dead-end street and it was the middle of the night. 1 RT 68.
 13 Lionetti stopped the taxicab in front of the first house past the corner of King and Virginia. When
 14 the taxicab stopped, the fare got out and urinated on a tree. Lionetti got out of the taxicab, walked
 15 over to the fare, and asked for his money – around eighteen or nineteen dollars. 1 RT 69, 73-74.

16 Lionetti called his dispatcher on his cell phone in a scared voice to report that he was in
 17 trouble and needed police and an ambulance. The dispatcher heard a thumping sound, and the phone
 18 went dead. The dispatcher called 911. The fare had gotten into the taxicab and driven it over
 19 Lionetti. 1 RT 49-51, 75-79. The fare drove the taxicab towards the end of the street, got out of the
 20 taxicab, and ran down an alley in the direction of his relative's house. 1 RT 79.

21 Officer Mizuhara and his partner were dispatched at about 12:10 a.m. on January 7, 2004,
 22 to the corner of King and Virginia. They found Lionetti lying face down in the street. Lionetti was
 23 fully awake, was complaining of extreme pain, thought he might die because of his injuries, and was
 24 very angry that his taxicab had been taken. 1 RT 124-126, 131-32. Within a few minutes of
 25 arriving, Officer Mizuhara asked Lionetti what happened to him, what he did for a living, and who
 26 did this to him. They talked for about ten minutes, until medical personnel arrived. Lionetti's

27
 28 2. The state Court of Appeal's summary of the facts is set forth at Exh. F, 2-3.

1 answers totally made sense. 1 RT 80, 126-127, 129-30. Lionetti said that he was a cab driver, that
2 he picked up a fare near the corner of Bascom and Fruitdale, and that the fare wanted to go to the
3 area of King and Virginia. The fare was an Hispanic male, about thirty, named Mike, wearing a
4 Pendleton shirt and blue jeans, and having about three days' growth of beard. Officer Mizuhara
5 broadcast the description to fellow officers. 1 RT 134-38. Officer Mizuhara asked how Lionetti was
6 injured. Lionetti explained that the fare got out of the taxicab and tried to leave, but Lionetti got out
7 of the taxicab and confronted him about the money. The fare pulled out a folding knife, like a
8 switchblade. The fare backed away toward the open taxicab door, quickly got into the cab, and
9 drove away. Lionetti was struck on his left side by the taxicab. Lionetti said that he could identify
10 the fare. 1 RT 138-43. The taxicab was found about a block away from Lionetti with the driver's
11 door open and nobody inside. 1 RT 145-46.

12 Lionetti arrived at San Jose Medical Center by paramedic ambulance at about 1 a.m. on
13 January 7, 2004. He had abrasions on his chest and both legs, and he was complaining of pain in
14 his right chest. 2 RT 375-76. He was given moderate amounts of morphine sulfate and Toradol to
15 control his pain so that he could lie still and cooperate in treatment by providing accurate
16 information. The treating physician did not notice anything to suggest that Lionetti was
17 experiencing hallucinations, blurred vision, or memory deficit. Lionetti passed a test for memory
18 deficit with the same standard as would apply to his treating physician or the prosecuting attorney.
19 2 RT 379-86, 388-89. An examination indicated that Lionetti suffered at least a broken rib. The
20 following day it was determined that he had suffered a broken clavicle and broken ribs. His
21 complaints of pain were accurate. 2 RT 297, 376-77, 385.

22 While physicians were treating Lionetti between 1 and 2 a.m. on January 7, 2004, Officer
23 Lem spoke to him. Lionetti was in a lot of pain, but his responses made sense and were consistent
24 with his prior description of the event. 1 RT 207-09. Lionetti described picking up the fare near
25 Bascom and Fruitdale, driving him in the taxicab down Virginia to King. When Lionetti stopped,
26 the fare got out and urinated against a tree. Lionetti got out of the taxicab and asked the fare for the
27 money. The fare pulled out a knife and jumped into the taxicab. As Lionetti confronted the fare
28 with the driver's door open, the fare backed up the taxicab and door knocked Lionetti down. After

1 the taxicab backed over Lionetti, he rolled to the side before the fare drove the taxicab forward and
 2 down the street. 1 RT 210, 212-16. Lionetti described the fare as an Hispanic male, about thirty,
 3 wearing a multi-colored flannel shirt and blue jeans, with a three-day growth of stubble. The fare
 4 acted in a bizarre manner, like he was high on drugs. 1 RT 82-83, 211.

5 Sergeant Overstreet noticed similarities, between the description that Lionetti gave of the
 6 suspect at the scene and at the hospital, to another suspect who had eluded officers the day before
 7 named Michael Mestez. A six-photo lineup containing Mestez's photo, but not petitioner's photo,
 8 was assembled and shown to Lionetti at about 2 a.m. in the emergency room. Lionetti said right
 9 away that he did not recognize anybody in the photo lineup. 1 RT 84-87, 235-36, 240-43, 248-49;
 10 2 RT 416.

11 Petitioner's sister, Denise Garduno, testified that petitioner arrived at her brother's
 12 residence during the early morning hours of January 7, 2004, looking for a place to stay. When told
 13 that he could not stay there, petitioner was not in a very good mood. He pulled out the folding-blade
 14 knife and had it in his hand. Ms. Garduno called 911 at 2:17 a.m. because she was afraid that
 15 petitioner would hurt her brother, Joseph Garduno, or himself. 2 RT 340-44, 353, 451, 457.
 16 Petitioner was wearing a Pendleton shirt, was unshaven, and was thirty-eight years old. 2 RT 346,
 17 456. Ms. Garduno did not think that petitioner had any money because she gave him a dollar. 2 RT
 18 353. There was a commotion with ambulances and sirens at the corner. Petitioner was acting
 19 nervously when a police car drove by. He went behind a parked car, although he may have tripped
 20 rather than trying to avoid the police. 2 RT 347-48, 449-50, 459, 462. Ms. Garduno was afraid that
 21 the police might harass petitioner and beat him up again. 2 RT 452.

22 Police arrived in response to Ms. Garduno's 911 call, talked to her, and arrested petitioner.
 23 Officer Yu, who had initially responded to the Lionetti carjacking, responded to the dispatch
 24 regarding Ms. Garduno's 911 call at about 2:18 a.m. Ms. Garduno initially implied that she did not
 25 make the 911 call, but soon told Officer Yu that she had called. She said that when petitioner
 26 arrived, he was acting strangely and looking for a place to stay. When she refused to let petitioner
 27 stay at the residence, he asked for a ride out of the area. 2 RT 340, 392-93, 395, 403-05. Petitioner
 28 came out of the residence at about 2:56 a.m. wearing a flannel shirt over a white T-shirt and blue

1 jeans. He had a folding knife in his pocket. 1 RT 163-67. The folding knife taken from petitioner
 2 had a push button that could be held with the thumb, allowing the knife to be flipped open with one
 3 hand. 1 RT 153-54, 168. Petitioner had at least a day's growth of stubble, and his demeanor was
 4 bizarre with a non-responsive stare. 1 RT 168-72.

5 At about 3:14 a.m., petitioner was taken to the emergency room where Lionetti
 6 immediately identified petitioner as his assailant. Lionetti said that was him, remarked on
 7 petitioner's face and clothes, and said he was sure that petitioner was the man who stole his taxicab.
 8 1 RT 218, 223, 244-45.

9 At about 9:30 to 9:45 a.m., Lionetti also told David Logan, the Operations Manager for
 10 the cab company, the truth about what happened. Lionetti was very talkative and interactive, just
 11 as he had always been during the eight years that Logan had known him. 1 RT 93-94, 181-83, 187-
 12 88. Logan testified that Lionetti gave him a good narrative of what had happened, answered
 13 clarifying questions, and did not say he did not remember. 1 RT 189. Lionetti said that after he
 14 stopped the taxicab and the fare urinated against the tree, Lionetti got out of the taxicab, went up to
 15 the fare, and asked if he was going to get paid. The fare pulled out a knife, waived it at Lionetti,
 16 went and got inside the taxicab, started the engine because Lionetti had left the key in the ignition,
 17 and put the car in reverse. Lionetti was unable to get out of the way as the fare tried to run over him.
 18 As the taxicab came in reverse, the driver's door was open, it caught Lionetti, and it knocked him
 19 down on the ground and dragged him back several feet. 1 RT 192-93. The fare put the taxicab in
 20 drive, drove forward, and tried to run over Lionetti a second time. The driver's door hit him and
 21 swung shut, as the fare took off with the taxicab. Lionetti was not searching for details or failing
 22 to recall, but was totally coherent. Lionetti talked about how quickly the police, ambulance, and
 23 paramedics responded and about how the police had brought the suspect to the emergency room so
 24 that Lionetti could identify him. Lionetti described the suspect as Hispanic. Logan asked Lionetti
 25 if he was sure it was the guy. Lionetti said yes, it's definitely the guy and that he was sure that the
 26 person the police brought to the hospital room was the person who did it. 1 RT 194-95.

27 Lionetti developed breathing difficulties due to bleeding in his chest. Late in January or
 28 early in February 2004, he was sedated and given psychotropic medication to induce a coma so that

1 he could endure the treatment he received. When he regained consciousness months later, his short-
 2 term memory was affected. 2 RT 298-305. By the time of trial he could remember much of what
 3 happened to him on January 7, 2004. Lionetti was truthful, accurate, and honest in recounting the
 4 events at the scene and at the emergency room that night. He remembered that he had identified his
 5 assailant at the emergency room, but could not identify petitioner as his assailant at trial. 1 RT 88-
 6 93. Fingerprints lifted from the taxicab did not match petitioner, Lionetti, any of the police
 7 officers at the scene, or comparisons from the computer data base. 2 RT 419, 434-35, 466-70, 481-
 8 83, 487-88, 491. At 4:25 a.m. on January 7, 2004, a blood sample was taken from petitioner. Upon
 9 analysis, it was negative for illegal drugs, but revealed a blood alcohol level of .09 percent. 2 RT
 10 415-16.

11 **Defense Evidence**

12 According to the medical records, Lionetti was admitted to the emergency room at 1:10
 13 a.m. At 1:20 a.m. he was given Tetanus vaccine and two milligrams of morphine sulfate. At 1:30
 14 a.m. he was given an additional two milligrams of morphine sulfate. At 2 a.m. he was given an
 15 additional four grams of morphine sulfate. Thus, he was given a total of eight milligrams of
 16 morphine sulfate in less than one hour. He was also given thirty milligrams of Toradol, a pain
 17 medication, at 2:18 a.m. 2 RT 321-23. Possible side effects of morphine sulfate are constipation,
 18 sensation of drunkenness, blurred or double vision, and disorientation. 2 RT 324, 331. Side effects
 19 for a patient such as Lionetti would be rare. Nothing in the medical records indicates that Lionetti
 20 suffered any side effects in the emergency room that night. 2 RT 331-32.

21 **STANDARD OF REVIEW**

22 A federal court may grant a writ of habeas corpus to a state prisoner only if the state
 23 court's rulings "resulted in a decision that was contrary to, or involved an unreasonable application
 24 of, clearly established Federal law, as determined by the Supreme Court of the United States" or
 25 were "based on an unreasonable determination of the facts in light of the evidence presented" in the
 26 state courts. 28 U.S.C. § 2254(d). Under the "contrary to" clause, a state court decision is contrary
 27 to federal law if it "contradicts the governing law set forth in our cases" or if it "confronts a set of
 28 facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at

1 a result different from our precedent.” *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see also*
 2 *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). That test does “not require citation of our cases
 3 – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the
 4 result of the state-court decision contradicts them.” *Early*, at 8.

5 The ultimate controlling authority is the holding of the Supreme Court’s cases at the time
 6 of the relevant state-court decision, not the dicta. *Williams v. Taylor*, 529 U.S. at 412. The state
 7 courts are presumed to “know and follow the law,” and the standard for evaluating state-court
 8 rulings, which are given the “benefit of the doubt,” is “highly deferential.” *Woodford v. Visciotti*,
 9 537 U.S. 19, 24 (2002) (per curiam). “A federal court may not overrule a state court for simply
 10 holding a view different from its own, when the precedent from this Court is, at best, ambiguous.”
 11 *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003). In other words, “[i]f no Supreme Court precedent
 12 creates clearly established federal law relating to the legal issue the habeas petitioner raised in state
 13 court, the state court’s decision cannot be contrary to or an unreasonable application of clearly
 14 established federal law.” *Brewer v. Hall*, 378 F.3d 952, 955 (9th Cir. 2004).

15 In order to warrant habeas relief, the state court’s application of clearly established federal
 16 law must be not merely erroneous, incorrect, or even “clear error,” but “objectively unreasonable.”
 17 *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003); *see also Williams v. Taylor*, 529 U.S. at 409; *Woodford*,
 18 *v. Visciotti*, 537 U.S. at 24. It is the habeas petitioner’s burden to make that showing. *Woodford*,
 19 at 25. In the same way, a “decision adjudicated on the merits in a state court and based on a factual
 20 determination will not be overturned on factual grounds unless objectively unreasonable in light of
 21 the evidence presented in the state-court proceeding.” *Miller-El v. Cockrell*, 357 U.S. 322, 340
 22 (2003). State court factual determinations are presumed correct unless rebutted by clear and
 23 convincing evidence. 28 U.S.C. § 2254(e)(1).

24 Harmless error review is no less exacting. An error can justify overturning the conviction
 25 only if it had a ““substantial and injurious effect or influence in determining the jury’s verdict.””
 26 *Penry v. Johnson*, 532 U.S. 782, 795 (2001), quoting *Brech v. Abrahamson*, 507 U.S. 619, 637
 27 (1993). The *Brech* standard applies to all § 2254 cases, regardless of the type of harmless error
 28 review conducted by the state courts. *Fry v. Pliler*, ____ U.S. ___, 127 S.Ct. 2321, 2328 (2007).

When there is no reasoned opinion from the highest state court to consider petitioner's claims, the federal court looks to the last reasoned state court opinion. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801-06 (1991); *Shackelford v. Hubbard*, 234 F.3d 1072, 1079, n. 2 (9th Cir. 2000).

Petitioner's claims, as identified below, fail as a matter of law under the AEDPA standards. The petition should accordingly be denied.

CLAIM ONE

**PETITIONER'S CLAIM OF VIOLATION OF HIS RIGHT TO
CONFRONTATION IS WITHOUT MERIT**

9 In claim one, petitioner contends that his federal constitutional right to due process was
10 violated when the trial court improperly allowed the testimony that Mr. Lionetti had identified
11 petitioner in person, in a one-person show up at the hospital, which was erroneously admitted over
12 objection in violation of his right to confrontation. This claim is without merit because petitioner
13 has failed to show that the state appellate court made an objectively unreasonable application of
14 clearly established United States Supreme Court precedent or that the state appellate court decision
15 was based upon an unreasonable determination of facts.

16 The United States Supreme Court has decided that “when the declarant appears for cross-
17 examination at trial, the Confrontation Clause places no constraints at all on the use of his prior
18 testimonial statements.” *Crawford v. Washington*, 541 U.S. 36, 59, n. 9 (2004). The state appellate
19 court also applied applicable Supreme Court precedent under *United States v. Owens*, 484 U.S. 554
20 (1988), which held that a witness’s memory loss does not render him unavailable for cross-
21 examination for purposes of the Confrontation Clause. The state appellate court used these
22 applicable Supreme Court precedents to determine that there was no violation of petitioner’s
23 confrontation right because the declarant in this case testified at trial and was subject to cross-
24 examination. Exh. F, 3-10.

25 Moreover, even if the victim's pretrial testimonial statements to police identifying
26 petitioner as the perpetrator were subject to exclusion under *Crawford*, the victim's similar
27 statements to Mr. Logan, his supervisor from a private business, were non-testimonial and did not,
28 therefore, come within the scope of the *Crawford* exclusion rule. Because the victim's statements

1 to Mr. Logan was non-testimonial, any error in admitting the victim's nearly identical statements
 2 to the officers identifying petitioner as his assailant is harmless under the *Brech* standard. The
 3 testimony of Mr. Logan that victim was lucid and able to tell him about the incident, and that the
 4 person the police showed him in the emergency room was the guy who did it, proved to be highly
 5 credible and unrebutted evidence that petitioner committed the crimes. Even if the testimony of the
 6 officers about the victim's identification of petitioner had been excluded, Mr. Logan's testimony
 7 would have resulted in petitioner's conviction. The jury's decision would have been the same.

8 Finally, petitioner forfeited his Confrontation Clause right as to all of the victim's out-of-
 9 court statements by his own wrongdoing in making the victim unavailable. Petitioner's own
 10 wrongdoing is an equitable bar to his objection on Confrontation Clause grounds to the admission
 11 of the victim's hearsay statements. *See Crawford v. Washington*, 541 U.S. at 62; *United States v.*
 12 *Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States v. Miller*, 116 F.3d 641, 667-68 (2d Cir.
 13 1997). "The law simply cannot countenance a defendant deriving benefits from murdering the chief
 14 witness against him." *United States v. Thevis*, 665 F.2d 616, 630 (5th Cir. 1982); *see also United*
 15 *States v. Dhinsa*, 243 F.3d 635, 651-52 (2d Cir. 2001). Petitioner should not be heard to complain
 16 that he could not cross-examine the victim about his out-of-court statements when petitioner's own
 17 criminal act made the victim unable to remember the details of his identification of petitioner. To
 18 the extent that petitioner argues that the doctrine of forfeiture does not apply here because the
 19 evidence is consistent with his having inadvertently hit the victim with the taxicab door, the victim
 20 testified to the contrary that the carjacker intentionally tried to drive over him – and succeeded in
 21 doing so. 1 RT 193-94. Petitioner probably hoped that no witnesses beside the victim were
 22 available, and intentionally tried to kill him or otherwise render him unavailable to identify
 23 petitioner. While petitioner may not have foreseen the exact circumstances that disabled the victim's
 24 memory, running over someone with a taxicab is definitely a way to try to interfere with both
 25 memory and availability as a witness. The forfeiture doctrine should apply in situations like this one
 26 when the victim is the only apparent witness and the defendant's actions are likely to cause the
 27 witness to be unavailable. This Court should reject his claim and deny the petition.

28 ///

1 **CLAIM TWO**2 **PETITIONER'S CLAIM OF DENIAL OF HIS RIGHT TO PRESENT A**
3 **DEFENSE IS WITHOUT MERIT**

4 In claim two, petitioner contends that his federal constitutional right to due process was
 5 violated when the trial court erred in excluding evidence which provided an alternative reason for
 6 petitioner to avoid contact with the police on January 7, 2004. This claim is without merit because
 7 petitioner has failed to show that the state appellate court made an objectively unreasonable
 8 application of clearly established United States Supreme Court precedent or that the state appellate
 9 court decision was based upon an unreasonable determination of facts.

10 Petitioner's claim is based upon his Sixth Amendment right to presenting a defense to the
 11 charges against him pursuant to *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) [the state must give
 12 a defendant the opportunity to present a defense by attacking his confession], and *Washington v.*
 13 *Texas*, 388 U.S. 14, 19 (1967) [the state must allow a defendant to present percipient witnesses to
 14 the alleged crime]. The state appellate court, without mentioning these cases in its decision,
 15 nevertheless followed their precedents in deciding that petitioner's right to present a defense was
 16 not violated. Exh. F, 10-13. Here petitioner was not denied the opportunity to call witnesses to the
 17 alleged carjacking, nor denied the opportunity to present a defense. Petitioner's defense was
 18 misidentification, that is, that somebody else did the crime. He presented evidence to support his
 19 claim that the victim was so medicated that he could not make a proper identification of petitioner
 20 in the emergency room.

21 Petitioner's sister, Denise Garduno, was not allowed to testify about her opinion as to
 22 whether petitioner was trying to avoid the police because officers had beaten him on a previous
 23 occasion. She was allowed to testify that she was not certain that petitioner was trying to avoid the
 24 police when they drove by that night. But she was not allowed to explain her answer. 2 RT 449-50.
 25 She testified on re-direct examination that she was afraid that petitioner might be harassed by the
 26 police and beat up again. 2 RT 452. Petitioner has failed to demonstrate that the state appellate
 27 court decision was contrary to clearly established federal law or that the state appellate court
 28 decision was based upon an unreasonable determination of facts.

1 Moreover, as explained above in response to petitioner's first claim, petitioner has failed
2 to show that he was prejudiced under the *Brecht* standard. That is, petitioner has failed to show that
3 if his sister's opinion about his reason for avoiding the police – that they had previously beaten him
4 – had been admitted on cross-examination rather than on re-direct examination, then the jury's
5 decision would have been different. This Court should reject his claim and deny the petition.

CLAIM THREE

**PETITIONER'S CLAIM THAT THE CUMULATIVE ERRORS WERE
PREJUDICIAL IS WITHOUT MERIT**

9 In claim three, petitioner contends that the cumulative errors were prejudicial. This claim
10 is without merit because petitioner has failed to show that the state appellate court made an
11 objectively unreasonable application of clearly established United States Supreme Court precedent
12 or that the state appellate court decision was based upon an unreasonable determination of facts.

13 The Court of Appeal implicitly rejected this claim of aggregated error without expressly
14 addressing it because there were no errors and no showing that petitioner suffered prejudice. Exh.
15 F. As explained above in regard to petitioner's previous claims, petitioner has failed to show that
16 there were errors and to show that he suffered prejudice. Petitioner has, therefore, failed to
17 demonstrate that the state appellate court decision was contrary to clearly established federal law
18 or that the state appellate court decision was based upon an unreasonable determination of facts.

19 But even if there were error, the cumulative effect would not have had a substantial and
20 injurious effect on the jury's determination. The evidence overwhelmingly showed that petitioner
21 flagged down a taxicab, got out, used a knife to confront the driver and take the taxicab, ran down
22 the driver, and drove away. Even if the victim's statement to the police identifying petitioner as the
23 thief were inadmissible, his statement to Mr. Logan was. And a mini-trial about the reasons for
24 petitioner's going behind a parked car when a police car drove by would not have changed the result.
25 Under the *Brecht* standard, any cumulative error was harmless because it did not have a substantial
26 influence in determining petitioner's guilt. The jury's decision would have been the same.

27 | //

1 **CONCLUSION**

2 Accordingly, for the reasons stated, respondent respectfully requests that the petition be
3 denied with prejudice.

4 Dated: April 14, 2008

5 Respectfully submitted,

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